IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1431 OF 2003

MAHINDRA & MAHINDRA LIMITED)
A Company incorporated under)
Companies Act, 1913, having)
its registered office at)
Gateway Building, Apollo Bunder,)
Mumbai and Automotive Division)
Factory at Akurli Road, Kandivli)
(East), Mumbai - 400 101.)..Petitioner.

V/s.

1. General Employees' Union, A)
registered trade union, having)
its office at Bhaktawar, 2nd)
floor, 2 station road, Andheri)
(West), Mumbai - 400 058.)
)
2. Shri Ganpat Laxman Bambade,)
C/o. General Employees' Union)
2, station road, Andheri (West))
Mumbai - 400- 058)
)
3. Mahindra & Mahindra Limited)
Central Jeep Plant Employees)
Co-operative Society Ltd., A)
Society registered under the)
Maharashtra Co-op. Societies)
Act, having its office at)
Akurli Road, Kandivli (East),)
Mumbai - 400 101)..Respondents.

Mr.C.U.Singh, Senior Advocate with Geetanjali Prabhu and Sushma Joshi i/b. M/s.Haresh Mehta & Co. for Petitioner.

Mr.R.D.Bhat for Respondent No.1.

Mr.R.N.Shah with Piyush Shah for Respondent No.3.

CORAM : DR.D.Y.CHANDRACHUD, J.

DATED : 26TH JULY, 2006.

ORAL JUDGMENT

. The Petitioner filed an application in a complaint instituted by the first Respondent of unfair labour practices under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("the Act"). Besides the Petitioner, the Third Respondent which is an Employees' Co-operative Canteen Society has been impleaded as a party to the proceedings in the Industrial Court. The relief which is sought in the complaint is a direction to the petitioner to treat the workmen engaged in the canteen as regular and permanent workmen of the Petitioner with retrospective effect from the date on which they joined service and to extend benefits to them at par with similarly situated workmen. The maintainability of the complaint was questioned in the application filed by the Petitioner on the ground that there is no relationship of employer and employee between the workmen of the Canteen and the Petitioner herein. A complaint under the Act is not maintainable in the absence of a relationship of employer and the employee in view of the Judgments of the Supreme Court in **Vividh Kamgar Sabha V/s. Kalyani Steels Ltd. [2001 CLR 532 (S.C.)], Cipla Ltd. V/s. Maharashtra General Kamgar Union [2001 I CLR 754**

(S.C.)] and Sarva Shramik Sangh V/s. Indian Smelting & Refining Co. Ltd. [(2003) 10 Supreme Court Cases,455]. The Petitioner prayed for the rejection of the complaint since the canteen employees on whose behalf the complaint was moved have been engaged by a Co-operative Society. The Industrial Court by its order dated 28th June, 2006 dismissed the said application. A Review Application was also rejected by an order dated 27th March, 2003. That led to the institution of these proceedings.

2. The first Respondent has filed a complaint under Items 5 & 9 of Schedule IV of the Act. The complaint relates to the workmen engaged in the Canteen at the Automotive unit of the Petitioner at Kandivli. The basic averment is that, according to the first Respondent, the workmen are in fact employees of the Petitioner and not of the Co- operative Canteen Society, which has been incorporated in order to manage the affairs in the Canteen. The allegation in the complaint is that the Petitioner and the Co- operative Society have colluded to show that the workmen are employees of the Society. The complainant Union alleges that the workmen are supervised by Officers of the Company and perform work of a perennial nature. According to the complainant, the Co-operative Society

is only a camouflage. The averment in paragraph 2(e) of the complaint is to the following effect:

> " The society is a fictitious contractor. It is fictitious in the sense that it exists only to camouflage the true employer-employee relationship that exists between the company and the workmen. It is meant to keep the workmen in a permanent state of insecurity. The co-operative society is entirely supervised, run and finally controlled by the company. "

The Union relies on the circumstance that the Canteen is maintained in pursuance of the mandatory requirement of section 46 of the Factories Act, 1948, and the contention is that the employees of the factory are in law and in fact employees of the company.

3. The law in regard to the maintainability of a complaint under the M.R.T.U. & P.U.L.P., 1971 is settled. The Act requires for the assumption of jurisdiction by the Industrial Court, the existence of a relationship of employer and employee. In the absence of a relationship of employer and employee, the Industrial Court does not have jurisdiction to entertain a complaint of unfair labour practice. When a complainant alleges that a contractor or an intermediary acting between the principal employer and the workmen is a camouflage or sham, that will require

adjudication by an appropriate forum in a reference under the Industrial Disputes Act, 1947. Only when a direct relationship of employer and employee is established in a complaint under the provisions of the M.R.T.U. & P.U.L.P. Act, 1971 maintainable.

4. This principle was initially recognised in the Judgment of the Supreme Court in **Central Labour Union (Red Flag) Bombay V/s. Ahmedabad Mfg. & Calico Printing Co. Ltd. [1995 II LLJ. 765 (S.C.)**. Subsequently, in **Vividh Kamgar Sabha V/s. Kalyani Steels Ltd.[2001 CLR 532]**, Mr.Justice S.N.Variava, speaking for a Bench of two learned Judges reiterated the principle in the following observations:-

> " The provisions of MRTU & PULP Act can only be enforced by persons who admittedly are workmen. If there is dispute as to whether the employees are employees of the company, then that dispute must first be got resolved by raising a dispute before the appropriate forum. It is only after the status as a workmen is established in an appropriate forum that a complaint could be made under the provisions of MRTU & PULP Act. "

The issue was revisited in Cipla (supra). The Judgment in Cipla is significant to the present case, because the Supreme Court specifically ruled that in a case where the contract between the employer and the intermediary is alleged to be a mere camouflage, it is

necessary to have an adjudication into the said claim before a complaint of unfair labour practices under M.R.T.U. & P.U.L.P., 1971 is entertained. In para 7 of the Judgment, the Supreme Court observed thus:-

> But one thing is clear - if the employees are working under a contract covered by the Contract Labour (Regulation and Abolition) Act then it is clear that the Labour Court or the industrial adjudicating authorities cannot have any jurisdiction to deal with the matter as it falls within the province of an appropriate Government to abolish the same. If the case put forth by the workmen is that they have been directly employed by the appellant-company but the contract itself is a camouflage and, therefore, needs to be adjudicated is a matter which can be gone into by appropriate Industrial Tribunal or Labour Court. Such question cannot be examined by the Labour Court or the Industrial Court constituted under the Act. The object of the enactment is, amongst other aspects, enforcing provisions relating to unfair labour practices. If that is so, unless it is undisputed or indisputable that there is employer-employee relationship between the parties, the question of unfair practice cannot be inquired into at all. The respondent union came to the Labour Court with a complaint that the workmen are engaged by the appellant through the contractor and though that is ostensible relationship the true relationship is one of master and servant between the appellant and the workmen in question. By this process, workmen repudiate their relationship with the contractor under whom they are employed but claim relationship of an employee under the appellant. That exercise of repudiation of the contract with one and establishment of a legal relationship with another can be done only in a regular Industrial Tribunal / Court under the I.D. Act. "

5. The same view now finds reiteration in the more recent Judgment in **Sarva Shramik Sangh V/s. Indian Smelting & Refining Co. Ltd. & Ors. [(2003) 10 Supreme Court Cases 455]**; wherein Mr.Justice Arijit Pasayat speaking for a Bench of two learned Judges formulated the principle thus:-

> " In order to entertain a complaint under the Maharashtra Act it has to be established that the claimant was an employee of the employer against whom complaint is made under the ID Act. When there is no dispute about such relationship, as noted in para 9 of Cipla case the Maharashtra Act would have full application. When that basic claim is disputed obviously the issue has to be adjudicated by, the forum which is competent to adjudicate. The sine qua non for application of the concept of unfair labour practice is the existence of a direct relationship of employer and employee. Until that basic question is decided, the forum recedes to the background in the sense that first that question has to be got separately adjudicated. Even if it is accepted for the sake of arguments that two forums are available, the court certainly can say which is the more appropriate forum to effectively get it adjudicated and that is what has been precisely said in the three decisions. Once the existence of a contractor is accepted, it leads to an inevitable conclusion that a relationship exists between the contractor and the complainant. According to them, the contract was a facade and sham one which has no real effectiveness. As rightly observed in Cipla case it is the relationship existing by contractual arrangement which is sought to be abandoned and negated and in its place the complainant's claim is to the effect that there was in reality a relationship between the employer and the complainant directly. It is the establishment of the existence of such an arrangement which decides the jurisdiction. That being the position. Cipla case rightly

> held that an industrial dispute has to be raised before the Tribunal under the ID Act to have the issue relating to actual nature of employment sorted out. "

6. The principles which emerge from these cases have been followed in several Judgments of this Court. In **Hindustan Coca Cola Bottle S/W Pvt. Ltd. V/s. Bhartiya Kamgar Sena & Ors. [2001 III CLR 1025]**, Hon'ble Mr.Justice A.P.Shah (as he then was) speaking for a Division Bench of this Court held that unless the relationship of employer and employee is undisputed or indisputable, the complaint under the M.R.T.U. & P.U.L.P. Act would not be maintainable. Hon'ble Mr. Justice R.M.Lodha reaffirmed the same principle, while delivering the Judgment of a Division Bench in **Quadricon Pvt. Ltd. & Ors. V/s. Maxi D'Souza & Ors. [(2004) III CLR 530]**, in the following words:

> " ....The Industrial Court constituted under the MRTU & PULP Act is not clothed with the jurisdiction to adjudicate the employer - employee relationship nor there is anything like prima facie consideration of relationship of employer-employee in the complaint under the said Act...."

7. In the present case, however, it has been asserted on behalf of the first respondent that the workmen on whose behalf the complaint has been filed are employees of a canteen, which is required to be

provided and maintained under section 46 of the Factories Act, 1948. Hence, it has been submitted that since the Canteen is maintained pursuant to the obligation cast by Section 46, all the employees of the canteen are deemed to be employees of the occupier of the factory and this being the deeming fiction of law, a complaint of unfair labour practice was maintainable. This submission falls for consideration.

8. Sub-section 1 of Section 46 of the Factories Act, 1948 empowers the State Government to make rules requiring that in any specified factory wherein more than 250 workers have been ordinarily employed a canteen or canteens shall be provided and maintained by the occupier for the use of the workers. Sub-section (2) entails what the rules can provide. Clause (b) thereof provides for the constitution of a managing committee for the canteen and representation of the workers in the management of the canteen. The State Government has notified the Maharashtra Factories Rules, 1963. Rules 79 to 85 elaborate upon the requirement enacted in Section 46 of providing and maintaining a canteen. Under Rule 79, the occupier of every factory wherein more than 250 workers are ordinarily employed is required to provide an adequate canteen according to the standards prescribed in the

Rules. The Maharashtra Factories Rules, 1960 throw some light upon the controversy involved in the present case because there are three provisions therein which recognise that a Co-operative Society registered under the Maharashtra Co-operative Societies Act, 1960 may be entrusted with the management of the canteen. Proviso (2) of Rule 83 provides that where the canteen is managed by a Co-operative Society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960, the accounts pertaining to such canteen may be audited in accordance with the provisions of the Maharashtra Co-operative Societies' Act, 1960. Rule 84 requires the constitution of a Managing Committee for each canteen as provided in clause (1). Howeover, the proviso carves out an exception in the case of a Co-operative Society registered under the Maharashtra Co-operatives Societies Act, 1960. Rule 85 (2) provides that where the canteen is managed by a co-operative society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960 such a society may include in the charges to be made for any such food, drink or other items served, a profit of upto 5% of its working capital employed in running the canteen. The substantive aspect of these Rules does not fall for determination but these provisions of the

Rules recognise that the obligation that is cast by Rule 79 in pursuance of section 46 can be discharged by the occupier of the factory providing and maintaining a canteen through a Co-operative Society. The appointment of a Co-operative Society to run and manage the canteen is a valid arrangement in the eyes of law.

9. The position and status of the workmen engaged in a statutory canteen maintained in pursuance to the Rules framed under section 46 of the Factories Act, 1948 has to come up for consideration in several cases before the Supreme Court. The Judgment of the Supreme Court in **The Saraspur Mills Co. Ltd. V/s. Ramanlal Chimanlal & Ors. [1974 (3) S.C.C.66]** turned on the definition of 'employee' in section 3(13) of the Bombay Industrial Relations Act, 1946. The expression 'employee' is defined in section 3 (13) in an extensive sense to include a person who is employed in execution of any work in respect of which the owner of an undertaking is an occupier within the meaning of sub-clause (e) of clause 14. Under sub-clause (e) of clause 14, where the owner of any undertaking entrusts the execution of the work of the undertaking to any other person other than as the servant or agent of the owner of the undertaking, the owner of the undertaking is defined to be the employer.

10. In **Parimal Chandra Raha V/s. Life Insurance Corporation of India [1995 II CLR 194 (S.C.)]** the issue was dealt with by two learned Judges of the Supreme Court and the principles that emerged were summarised. In relation to the workmen of a statutory canteen, the Supreme Court held thus:

> 27(i) Where, as under the provisions of the Factories Act, it is statutorily obligatory on the employer to provide and maintain canteen for the use of his employees, the canteen becomes a part of the establishment and, therefore, the workers employer in such canteen are the employees of the management."

Subsequent thereto a larger Bench of 3 Judges considered the correctness of the decision in Parimal Chandra Raha in **Indian Petrochemicals Corporation Ltd. & Anr. V/s, Shramik Sena & Ors. [1999 II CLR 634]**. The Supreme Court held, relying on the earlier decisions in **M.M.R. Khan & Ors. V/s. Union of India & Ors. [1990 II CLR 262 S.C.]** and **Employers in relation to the Management of Reserve Bank of India V/s. Workmen [(1996 I CLR 740 S.C.]** that the workmen of a statutory canteen would be workers of the establishment for the purpose of the Factories Act, 1948 only and not for all other purposes. The Supreme Court held that the Factories Act, 1948 does not govern

the rights of employees with reference to recruitment, seniority, promotion, retirement benefits and other matters. These matters, the Court held are governed by statute, rules, contracts and policy. Therefore, the contention that workmen employed in a statutory canteen ipso facto become workmen of the Company was held to be not capable of acceptance. Proposition (i) of the principles laid down in Parimal Chandra Raha was explained in the Judgment of the larger Bench in IPCL:

> " If the argument of the workmen in regard to the interpretation of Raha's case is to be accepted then the same would run counter to the law laid down by a larger Bench of this Court in Khan's case (supra). On this point similar is the view of another three-Judge Bench of this Court in the case of Employers in relation to the Management of Reserve Bank of India V. Workmen, (1996 I CLR 740 S.C.). Therefore, following the judgment of this Court in the case of Khan and R.B.I. (supra), we hold that the workmen of a statutory canteen would be the workmen of the establishment for the purpose of the Factories Act only and not for all other purposes. "

In **Workmen of the Canteen of Coates India Limited V/s. Coates of India Limited decided** on 28th August, 1996 (but reported in **2004 3 SCC 547**) a Bench of the Supreme Court consisting of Mr.Justice J.S.Verma & Mr. Justice B.N.Kirpal (as the learned Chief Justices then were) held:

> " It is sufficient for us to state that some requirement under the Factories' Act of providing a canteen in the industrial establishment, is by itself not decisive of the question or sufficient to determine the status of the persons employed in the canteen."

11. In **VST Industries Ltd. V/s. VST Industries Workers' Union [(2001) 1 LLJ 470],** a Bench of two learned Judges of the Supreme Court considered an appeal against a decision of the Andhra Pradesh High Court where a Writ Petition under Article 226 had been entertained and a writ of mandamus was issued for the absorption of canteen workers in a canteen maintained by a public limited company under Section 46 on the ground that a public duty was owed. The Supreme Court held that the High Court was in error in entertaining the Petition and holding that it had jurisdiction. However, having regard to the special features of the case upon which an adjudication had been rendered by the High Court on merits, the Supreme Court clarified that it was not disturbing the ultimate decision.

12. In **Hari Shankar Sharma V/s. M/s. Artificial Limbs Manufacturing Corporation [2002 I CLR 13]**, a Bench of two learned Judges of the Supreme Court held that it cannot be regarded as a universal or invariable principle that employees in a canteen provided under

the provisions of Factories Act, 1948 would ipso facto be deemed to be employees of the occupier. The Supreme Court noted that the manner in which the obligation of maintaining the canteen should be discharged is left to the discretion of the occupier and where, instead of running a canteen itself, the occupier of a factory engages a contractor, it cannot be postulated that in such an event the persons working in the canteen would be the employees of the establishment. Ultimately, the Supreme Court held that the issue is, therefore, primarily and ultimately one of fact to be determined by a fact finding tribunal. The Supreme Court held as follows:

> " ...assuming that section 46 of the Factories Act was applicable to the respondent no.1, it cannot be said as an absolute proposition of law that whenever in discharge of a statutory mandate, a canteen is setup or other facility provided by an establishment, the employees of the canteen or such other facility become the employees of that establishment. It would depend on how the obligation is discharged by the establishment. It may be carried out wholly or substantially by the establishment itself or the burden may be delegated to an independent contract. There is nothing in S.46 of the Factories Act, nor has any provision of any other statute been pointed out to us by the appellants, which provides for the mode in which the specified establishment must set up a canteen. Where it is left to the discretion of the concerned establishment to discharge its obligation of setting up a canteen either by way of direct recruitment or by employment of

a contractor, it cannot be postulated that in the latter event, the persons working in the canteen would be the employees of the establishment. Therefore, even assuming that the respondent No.1 is a specified industry within the meaning of section 46 of the Factories Act, 1948, this by itself would not lead to the inevitable conclusion that the employees in the canteen are the employees of respondent No.1.

13. In **Steel Authority of India Ltd. & Ors., etc. etc. V/s. National Union Water Front Workers & Ors., etc. etc. [2001 III CLR 349]** the Constitution Bench of the Supreme Court adjudicated upon three issues which arose for determination:

"(i) What is the true and correct import of the expression "appropriate government" as defined in clause (a) of sub-section (1) of Section 2 of the CLRA Act;

(ii) Whether the notification dated December 9, 1976 issued by the Central Government under Section 10(1) of the CLRA Act is valid and applies to all Central Government Companies; and

(iii) Whether automatic absorption of contract labour, working in the establishment of the principal employer as regular employees,

follows on issuance of a valid notification under S.10(1) of the CLRA Act, prohibiting the contract labour in the concerned establishment. "

In the course of the Judgment, the Supreme Court considered earlier Judgments on the subject and held that the decided cases fell into three categories. The first category involved cases where contract labour had been ordered to be abolished by a notification under section 10(1) of the CLRA Act. In such a case, it was held that no automatic absorption of the contract labour working in the establishment was ordered. The second category was where the contract was found to be sham and a camouflage where the workmen of the Contractor were held to be employees of the principal employer. The third was a category where in discharge of a statutory obligation of maintaining a canteen in an establishment, the principal employer availed of the services of a contractor and here the Courts have held that contract labour would indeed be the employees of the principal employer.

14. There have been cases before the Supreme Court where, in the context of public sector undertakings, the High Courts have entertained Petitions under

Article 226 of the Constitution for seeking regularisation of the services of contract workmen engaged in a canteen run in pursuance of the obligation under Section 46 of the Factories Act, 1948. The decisions in the case of **National Thermal Power Corporation Ltd. V/s. Karri Pothuraju & Ors. [2003 III CLR 285]** and **Mishra Dhatu Nigam Ltd., etc. V/s. M.Venkataiah & Ors, etc. etc. [2003 III CLR 516]** are illustrative of this category of cases. The decision in **Haldia Refinery Canteen Employees Union V/s. M/s. Indian Oil Coporation Ltd. [(2005) 5 S.C.C 51]** arose in a situation where there was a genuine canteen contract. The Supreme Court held that while the management had an effective control in regard to the running of the canteen, it had nothing to do with either the appointment of workmen or taking disciplinary action against the workmen working in the canteen. The Supreme Court held that this did not mean that the employees working in the canteen had become employees of the management. The Supreme Court held thus:

> " No doubt, the respondent management does exercise effective control over the contractor on certain matters in regard to the running of the canteen but such control is being exercised to ensure that the canteen is run in an efficient manner and to provide wholesome and healthy food to the workmen of the establishment. This, however,does not mean that the employees working in the canteen have

become the employees of the management. "

The Supreme Court held that the supervisory control over the workers was kept by the management to ensure a check on the quality and service provided to its employees. The supervisory control was only to ensure that the workers were qualified and capable of rendering proper service to the employees of the management.

15. Finally, it would be necessary to advert to the decision in **State of Karnataka V/s. KGSD Canteen Employees' Welfare Assn. [(2006) 1 Supreme Court 567]**. Mr.Justice Shri S.B.Sinha speaking for a Bench of two learned Judges considered the Judgments of the Supreme Court on this subject and having done so, held that in each case, it was for the Industrial Adjudicator to apply the relevant tests enunciated by the Supreme Court in the context of the facts appearing in that particular case. Several cases having been considered in the facts and circumstances obtaining therein. It would not be proper for the industrial adjudicator to apply the ratio of one decision to the exclusion of another without considering the facts and circumstances involved therein. The Supreme Court has held that:

> " We have referred to the aforementioned decisions in order to show that in each of the aforementioned cases the industrial adjudicator was required to apply the relevant tests laid down by this Court in the fact situation obtaining therein. Most of the cases referred to hereinbefore were considered by this Court in the peculiar facts and circumstances obtaining therein and, thus, it is even not proper for the industrial adjudicator to apply the ratio of one decision to the exclusion of other without considering the facts and circumstances involved therein. The law, however, does not appear to be settled as to whether even in a case where the employer is required to run and maintain a canteen in terms of the provisions of the statute, the employees of the canteen would automatically be held to be the workers of the principal employer for all intent and purport and not for the purpose of the Factories Act alone. We, however, are not concerned with the said question in this matter and refrain ourselves from making any observation in respect thereof. "

. In KGSD the Supreme Court does not consider the law to be settled that where a canteen is required to be provided under the Factories' Act, 1948, the employees of the canteen would automatically become the workmen of the principal employer for all purposes, as distinguished from the purposes of the Factories Act, 1948.

17. An analysis of the decided cases demonstrates that in all decisions referred to earlier, there was an adjudication on the status of the Canteen workmen before orders of regularization or, as the case may be,

of absorption were passed. In several cases, the adjudication was before the Industrial Court in a reference under Section 10 of the Industrial Disputes Act, 1947. In certain other cases, where the employer fell within the purview of the expression "State" under Article 12 of the Constitution, an investigation into facts was carried out initially in the course of writ proceedings before the High Court under Article 226 of the Constitution. Parimal Chandra Raha (supra) involved a canteen of the Life Insurance Corporation and L.I.C. as a statutory entity was amenable to the exercise of the writ jurisdiction. The judgment of the Supreme Court contains from paragraph 29 onwards a detailed elaboration of the facts relating to the conditions of service prevalent in the canteen. The decision of the Supreme Court in Coates of India Ltd. (supra), arose out of a reference to the Industrial Tribunal under Section 10 of the Industrial Disputes Act, 1947. Similarly, the decision in Artificial Limbs (supra) arose out of an industrial dispute which was referred for adjudiction to the Labour Court. The decisions in National Thermal Power Corporation (supra) and Mishra Dhatu Nigam (supra) involve Public Sector Undertakings which were amenable to the writ jurisdiction under Article 226 of the Constitution and in which the Andhra Pradesh High Court had investigated

the conditions of service of the Canteen workmen. Haldia Refinery (supra), where the Supreme Court affirmed the view of the Division Bench of the Calcutta High Court that the workmen of the Canteen had not become the workers of the management for a purpose other than the Factories Act, 1948, was similarly a situation in which Indian Oil Corporation's Undertaking was amenable to the writ jurisdiction of the Calcutta High Court being "State" under Article 12 of the Constitution. The decision in KGSD (supra), similarly releated to a grievance brought before the Court by an Association of Employees in the Karnataka Government Secretariat Department Canteen. The judgment of the Supreme Court in **KGSD**, in fact, emphasises that in the decided cases it is the industrial adjudicator who is required to apply the relevant tests laid down by the Supreme Court in several decisions. The decisions of the Supreme Court, in matters relating to Canteens governed by Section 46 of the Factories Act, 1948, therefore, do not support the proposition that all the employees engaged through a contractor or an intermediary in such a canteen ipso facto become the employees of the management for a purpose other than the Factories Act. On the contrary, it is on the basis of an adjudication of the facts relating to each case that the final outcome to grant regularisation in

certain cases or not to grant regularisation in certain others, has been founded. The judgments of the Supreme Court, emphasise the need for an adjudication before the relief which is claimed by the canteen workmen is granted.

18. In the present case, the complaint which has been instituted by the first respondent before the Industrial Court proceeds on the foundation that though the workmen on whose behalf the complaint is instituted are employees of the co-operative canteen society, the society is merely a camouflage; that this arrangement is fictitious and in fact, the workmen engaged in the canteen are workmen of the Petitioner and not of the Canteen Society. These averments are sufficient to hold, following the Judgments in Kalyani Steels, Cipla and Indian Smelting (supra) that the allegation as to whether an arrangement is sham or genuine cannot be investigated in a complaint under the M.R.T.U. & P.U.L.P. Act, 1971. In such a case, it would be necessary that there be an adjudication for establishing the existence of an employer-employee relationship upon which alone, a complaint under the M.R.T.U. & P.U.L.P., 1971 would lie. The alternate basis of the complainant is that the canteen in question has been provided and maintained in pursuance

of the obligation cast upon the occupier, the Petitioner herein, under the Rules framed under Section 46 of the Factories Act, 1948. Section 46 of the Factories Act, 1948 is an enabling provision which empowers the State government to frame rules requiring that the occupier of a factory in which 250 workers are ordinarily employed shall provide and maintain a canteen. The Maharashtra Factories Rules, 1963 do not mandate that the obligation to provide and maintain a canteen should be discharged only by the occupier providing and maintaining the canteen itself. On the contrary, the material provisions of Rules 83, 84 & 85 contemplate a canteen managed by a Co- operative Society registered under the Maharashtra Co-operative Societies Act, 1960. Undoubtedly, what the statute permits is a genuine and not a sham arrangement. But where the arrangement is alleged to be sham, that would require an adjudication. The Judgments of the Supreme Court hold that where a canteen is provided and maintained under Section 46 of the Factories Act, 1948, it cannot be regarded as a universal proposition that by a deeming fiction of law, the employees of the canteen must be regarded for all purposes as the

workmen of the establishment. Where relief of

absorption has been granted, that has proceeded upon an adjudication based upon the facts of a particular case. In each case, the facts relating to the circumstances in which the canteen is run and conducted, the nature of supervision and control; and other such factors have been considered. Therefore, in the absence of adjudication in the instant case, in a reference under the Industrial Disputes Act, 1947, a complaint under the M.R.T.U.P. & P.U.L.P. Act, 1971 of unfair labour practices is not maintainable. The basic jurisdictional fact namely an undisputed or indisputable relationship of employer-employee is wanting.

19. In these circumstances, the Industrial Court is manifestly in error in rejecting the application moved by the Petitioner for dismissal of the complaint. The complaint, in view of the law laid down by the Supreme Court in Kalyani Steels, Cipla, Indian Smelting and other cases, is clearly not maintainable.

20. The Petition accordingly will have to be allowed and is accordingly allowed. The orders of the Industrial Court dated 28th June, 2002 and 27/3/2003

are quashed and set aside. Complaint (ULP) No. 250/97 is accordingly rejected as not maintainable.

sd/-

(DR.D.Y.CHANDRACHUD,J.)